

Overview of CPO Protections for LGBT Victims of Domestic Violence

Domestic violence occurs in same-sex relationships just as in heterosexual relationships. However, LGBT victims of domestic violence are often denied the civil legal remedies that are available to heterosexual victims.

Three states, Louisiana¹, Montana and South Carolina, have protective order statutes that explicitly deny LGBT victims the ability to seek civil orders of protection by requiring the requisite relationship to be with an individual of the opposite sex.² Only one state, Hawaii, specifically extends protection to LGBT victims by including “current or former same sex partners” within its statutory language. The remaining states have protective order statutes that utilize gender neutral language, leaving the protection of LGBT victims of domestic violence up to interpretation by the courts.

Currently, only four states (Florida, Kentucky, Pennsylvania and Illinois) have case law ensuring the availability of civil orders of protection to LGBT victims of domestic violence. Two states (Ohio and New Jersey) and the District of Columbia have case law that suggests civil orders of protection are available to LGBT victims, although such availability was not the legal question before the courts. One state, Virginia, does not have case law interpreting its statute, but an Attorney General’s opinion suggests the statute does not apply to same-sex couples.

¹ Nevertheless, LGBT victims of domestic violence are entitled to the same relief under the Prevention from Dating Violence Act. See La. Rev. Stat. Ann. §46.2151 (2006).

² New York, which previously fell into this category, recently amended its protective order to provide more inclusive, gender-neutral language. For more information, see S.8665, 2008 Leg. Sess. (N.Y. 2008) available at <http://assembly.state.ny.us/leg/?bn=S08665>.

Introduction

Domestic violence occurs in same-sex relationships just as in heterosexual relationships. However, LGBT victims of domestic violence are often denied the civil legal remedies that are available to heterosexual victims.

Three states, Louisiana³, Montana and South Carolina, have protective order statutes that explicitly deny LGBT victims standing to seek civil orders of protection by requiring the requisite relationship to be with an individual of the opposite sex.⁴ Only one state, Hawaii, specifically extends protection to LGBT victims by including “current or former same sex partners” within its statutory language. The remaining states have protective order statutes that utilize gender neutral language, leaving the protection of LGBT victims of domestic violence up to interpretation by the courts.

Currently, only four states (Florida, Kentucky, Pennsylvania and Illinois) have case law declaring the availability of civil orders of protection to LGBT victims of domestic violence. Two states (Ohio and New Jersey) and the District of Columbia have case law suggesting that civil orders of protection are available to LGBT victims, although the cases themselves do not address that legal question.

A. Case law confirming the availability of CPOs to LGBT victims of domestic violence

Courts in the following cases have interpreted vague statutory language and determined that civil orders of protection are available to LGBT victims of domestic violence.

1. Peterman v. Meeker (Florida) 855 So.2d 690 (Fla. App. 2 Dist. 2003)

Holding: State statute authorizing family or household members to seek domestic violence injunctions applies to same-sex couples.

Summary: John Russell Peterman (Appellant) and Nute Meeker (Appellee) were partners for thirteen years and lived together in a house they jointly owned. As their relationship was ending there were a number of violent episodes between the couple. Meeker eventually sought an injunction against Peterman under a statute (§741.30) authorizing family or household members to seek injunctions against domestic violence. Included in the definition of “family or household members” are “persons who are presently residing together as if a family or who have resided together in the past as if a family.” Peterman’s attorney sought to dismiss the petition, arguing that same-sex couples did not qualify as “persons residing together as if a family” because same sex couples cannot marry in the state of Florida. The trial court denied the motion and granted the injunction. Peterman appealed.

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On appeal, the court affirmed. The court cited §741.30(1)(e) of the statute, which states: “No Person shall be precluded from seeking injunctive relieve pursuant to this chapter solely on the basis that such a person is not a spouse.” Therefore, the court concluded that the statute does not exclude persons who otherwise meet the requirements for relief but seek protection from a person of the same sex. The court further cited court cases around the country addressing the issue that have held same-sex partners qualified for protection under domestic violence statutes.

2. D.H. v. B.O. (Pennsylvania)
734 A.2d 409 (Pa. Super. 1999)

Holding: Same-sex partner was entitled to seek protection under state protection from abuse statute, although the evidence of abuse was insufficient to support the issuance of a protective order.

Summary: D.H. (Appellee) sought a protection from abuse order (PFA) against his former lover, B.O. (Appellant), to prevent him from contacting him in any manner. After a hearing, a permanent PFA was issued which enjoined B.O. from contacting D.H. for one year. B.O. appealed, arguing that the PFA order should be vacated because D.H. did not establish the requisite relationship or an act of abuse that would warrant protection under the state statute permitting “sexual or intimate partners” to seek orders of protection. On appeal, the Superior Court of Pennsylvania found the trial court’s record supported the finding that the parties were formerly “sexual or intimate partners.” In his petition for a PFA order, D.H.’s referred to B.O. as his former roommate and homosexual lover, and testified at trial to their former sexual relationship. The Court held this evidence was sufficient to establish the requisite relationship and that D.H. was therefore entitled to seek protection under the PFA statute. Nonetheless, the Court found the evidence of abuse insufficient to justify the issuance of a PFA order. The Court stated that the complained conduct did not amount to an “act of abuse” under the state Protection from Abuse Act because there were no threats of physical injury or other conduct that would place D.H. in reasonable fear of bodily injury.

3. Ireland v. Davis (Kentucky)
957 S.W. 2d 310 (Ky. App. 1997)

Holding: State statute authorizing “member of an unmarried couple” to obtain domestic violence protective order applies to same-sex couples.

Summary: John Ireland (Appellant) obtained a domestic violence order (DVO) against his partner Blake Davis (Appellee) pursuant to a state statute permitting family members and “members of an unmarried couple” to seek orders of protection against domestic violence. Several months later, Ireland filed an affidavit alleging that Davis has violated the terms of the DVO and a show cause warrant was issued by a Fayette District Court judge. Another district court judge, however, set aside the arrest warrant and dismissed all of the proceedings, stating he lacked jurisdiction under the domestic violence statutes (KRA 403.715-.785) because Ireland and Davis were a same-sex couple. Ireland appealed.

On appeal, the Fayette Circuit Court affirmed the district court’s dismissal. The Circuit Court found the definition of “member of an unmarried couple” ambiguous and looked to a prior

version of the statute which required an unmarried couple to have a child in common in order to be afforded protection. The court concluded that same-sex couples cannot have a child in common and therefore the new statute did not extend protection to such couples. The matter went before the Court of Appeals of Kentucky on discretionary review.

The Court of Appeals reversed the orders of the Fayette district and circuit courts and the case was remanded to the district court for reinstatement of the domestic violence proceedings. The Court found the gender neutral language of the new statute unambiguous, stating that the Circuit Court's interpretation of the statute would produce results contrary to its purpose. Further, Court noted that to exclude same-sex couples from protection under the statute would be to deny them the same protection that other couples are afforded under the law, although in deciding the case on other grounds it did not address the constitutional argument.

4. Glater v. Fabianich (Illinois)

252 Ill. App.3d 372 (Ill.App. 1 Dist. 1993)

Holding: Statute authorizing "family or household members" to seek orders of protection was designed to protect intimate partners and relief is not limited to those related by blood or marriage. Evidence was sufficient to establish common household between former same-sex partners.

Summary: Allen Glater (Appellee) sought an order of protection against Anthony Fabianich (Appellant) pursuant to the Illinois Domestic Violence Act. The statute protects family or household members, defined as "persons who share or formerly shared a common dwelling...". In his petition, Glater stated that he had formerly shared a residence with Fabianich and alleged threats and acts of physical abuse. The Circuit Court issued an emergency order of protection and set the matter for a hearing. At the hearing, Fabianich filed a motion to dissolve the protective order alleging that the parties never shared a common dwelling and that Glater suffered no immediate threat of harm. The trial court found there was sufficient basis to establish a common household between the parties and denied Fabianich's motion. After hearing testimony on the issue, the trial court entered a plenary order of protection. Fabianich appealed.

On appeal Fabianich argued that his motion to dismiss had been improperly denied, stating again there was no evidence to support the finding that the parties had shared a common dwelling and further, that there was insufficient evidence of abuse. The appellate court disagreed. The Court refused to restrict the statute's provisions to persons related by marriage or blood, stating that the purpose of the law was to prevent abuse between persons sharing intimate relationships. Further, evidence established that Glater had committed abuse or that the potential for abuse existed. Judgment affirmed.

B. Case law implying the availability of CPOs for LGBT victims of domestic violence

The following cases suggest that civil orders of protection are available to LGBT victims of domestic violence in that state, although they do not specifically address that legal question.

1. Richardson v. Easterling (D.C.)

878 A.2d 1212 (D.C. 2005)

Summary: Michael Richardson (petitioner) sought a civil protection order against his former same-sex partner (Aaron Easterling-defendant) to prohibit him from stalking and conduct which he alleged constituted an “intrafamily offense” under the Intrafamily Offenses Act. In his petition, Richardson accused Easterling of threatening to make false reports regarding his sex life and his intentional spread of communicable diseases to law enforcement and to his employer. Further, Richardson alleged that Easterling contacted his coworkers to inform them of his sexual orientation and told them he was knowingly transmitting sexual transmitted diseases. The trial court found that these types of threats, amongst other allegations, did not constitute an “intrafamily offense” and denied Richardson’s petition.

On appeal, the D.C. Court of Appeals reversed. The Court of Appeals acknowledged that it was an undisputed fact that the two men shared a residence and maintained a romantic relationship, and further found sufficient evidence of an intrafamily offense.

Note: This case provides a good example of courts’ struggle to recognize of some of the unique characteristics of domestic violence as it manifests in same-sex relationships. Threatening to “out” a person to the community is one of the ways perpetrators of domestic violence maintain control. For a full analysis see Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 Hastings Women’s L.J. 259 (2008).

2. Moore v. Bentley (Ohio) Ohio App. 10 Dist. (2004)

Summary: Petitioner was issued an ex parte civil protective order against his same-sex partner. On review, the court found that there was not enough evidence to demonstrate fear of imminent serious physical harm that was required for the issuance of a civil protective order. The court did not address the lower court’s issuance of an ex parte civil protective order against a same-sex partner as an error.

Note: While there are no reported cases addressing the availability of civil order of protection to LGBT victims of domestic violence, Ohio courts have ruled on numerous occasions that its criminal domestic violence statute is not limited to persons of the opposite sex. In *State v. Hadinger*, 573 N.E. 2d 1191 (Ohio App. 1991) the court held that the domestic violence statute is meant to protect all persons who are cohabitating regardless of their sex. The Court stated that to rule otherwise would undermine the efforts of the legislature to safeguard, “regardless of their gender,” the rights of victims of domestic violence. In *Austin v. Austin*, 866 N.E.2d 74 (Ohio App. 9 Dist. Feb 20, 2007) the court reaffirmed that the definition of cohabitation does not have to be between a man and a woman, as long as the relationship is “akin to marriage.”

3. Storch v. Sauerhoff (New Jersey) 334 N.J. Super. 266, 757 A.2d. 836 (2000)

Summary: Storch (plaintiff) sought a restraining order against her stepmother (Sauerhoff) based on their relationship as former household members. Storch and Sauerhoff lived in separate residences on the same block for eleven years. Sauerhoff argued that the plaintiff was neither a “family member” nor a member of the household. The Court of Appeals disagreed, finding that the stepmother/neighbor was a former or de facto household member.

In examining the term “household member,” the court looked at the legislative history of New Jersey’s Domestic Violence Act of 1991. It found that by replacing the word “cohabitant” with the term “household member” the legislature clearly intended to expand coverage of the act to any person who has a close relationship with his or her batterer. Further, the Court stated that the Act “has been further amended to expand the list of persons protected. While the prior law required that victims be cohabitants of the opposite sex, related by blood, the current Act protects unrelated, same-sex persons living together, elderly persons in the care of unrelated persons and any other present or former household member.”

C. Case law interpreting the definition of “household member” as it applies to roommates

The following cases suggest an extension of the definition of “household member” to include roommates who are not engaged in an intimate relationship. These cases are relevant as many same-sex couples go through the court system without revealing the romantic nature of their relationship.

1. Hamilton v. Ali (New Jersey)

350 N.J. Super. 479, 795 A.2d 929 (2001)

Holding: Suitemate in a college dormitory was a “household member” within the meaning of the Prevention of Domestic Violence Act.

Summary: John Hamilton (plaintiff) and Richard Ali (defendant) were suitemates in a college dormitory. After an altercation involving physical violence and damage to property, Hamilton sought a restraining order against Ali under the Prevention from Domestic Violence Act. The question before the New Jersey Superior Court was whether a college dormitory suitemate is a “victim” within the meaning of the domestic violence statute. The Court answered in the affirmative, finding that the legislature intended the definition of “household member” to be interpreted broadly when it failed to provide a definition for the term. The Court restated its conclusion in *Storch v. Sauerhoff*, where it stated that by replacing the word “cohabitant” with the term “household member” the legislature clearly intended to expand coverage of the act to any person who has a close relationship with his or her batterer.

The Court further reached its conclusion by examining case law which states that to qualify as a “household member” the parties must have more than a casual dating relationship but less than the parties residing together. Applying criteria outlined in case law, the Court found that a college dormitory arrangement constitutes a “family-like” setting within the meaning of the Act.

2. Sommi v. Ayer (Massachusetts)

51 Mass. App. Ct. 207, 744 N.E. 2d 679 (2001)

Summary: Samuel Ayer (defendant) lived with Richard Sommi and Samuel Keller (plaintiffs) as a houseguest while attending school. After an argument, Ayer left the home and obtained ex parte restraining orders against the plaintiffs alleging physical and emotional abuse. A few days later, Sommi and Keller obtained ex parte restraining orders against Ayer in another district court. At a hearing on the merits, the district court judge stated that there was “abuse amongst

all the parties here, and there will be mutual restraining orders.” However, the judge simply extended the ex parte no contact and stay away orders previously issued to the plaintiffs for one year and declined the Ayer’s request for written findings of fact. Ayers appealed. On review, the issue before the court was whether the restraining orders issued to the plaintiffs against the defendant were mutual restraining orders. Ayer argued that they were and thus should be vacated because the judge failed to make written findings of fact before issuance as required under the Massachusetts statute. The Court of Appeals agreed and vacated the orders.

Note: This case is included in these case summaries as it suggests that “household members” under Massachusetts statute applies to former roommates who were not engaged in an intimate relationship.

3. O’Kane v. Irvine (California)
47 Cal. App. 4th 207 (1996)

Summary: O’Kane (plaintiff) and Mark Irvine (defendant) each sublet a bedroom in a home. There was no romantic relationship between them. Following an altercation in which O’Kane alleged Irvine assaulted her, she obtained a temporary restraining order under the Domestic Violence Prevention Act. At the hearing, the trial court issued O’Kane a three-year restraining order. Irvine appealed and the Court of Appeal reversed. The court held that the trial court did not have jurisdiction to issue a restraining order as the parties were not “cohabitants” within the meaning of the Act. Under the Act, “cohabitants” are defined as persons “who regularly reside in the household.” Looking to the legislative history, the Court stated that there is nothing to indicate an intent to include the type of residential arrangement that existed between these parties. Rather, the Court found that the word “household” under the Act was meant to include “a collection of persons, whether related or not, who live together as a group or unit of permanent or domestic character... who direct their attention toward a common goal consisted of their mutual interests.” O’Kane and Irvine did not fit this definition.

Note: This case narrows the definition of “cohabitants.” California, however, permits dating partners to seek orders of protection.

The following bibliography of legal resources has been compiled to assist with research on family law issues that may be encountered when working with LGBT victims of domestic violence, sexual assault, and stalking. It is not intended to be a comprehensive listing of research in this area of law; the ABA Commission on Domestic Violence should not be construed as endorsing these resources at the exclusion of others. Users are advised to independently confirm data with source documents cited. Should you have any questions, comments or additional resources you would like to see included, please contact abacdvt@abanet.org.

Adoption

1. Overview of State Adoption Laws, Lambda Legal (visited June 24, 2008) <<http://www.lambdalegal.org/our-work/issues/marriage-relationships-family/parenting/overview-of-state-adoption.html>>. Chart provides an overview of state adoption laws, including individual, second-parent, stepparent and joint adoptions.
2. Second-Parent Adoption Laws, National Gay and Lesbian Task Force (last updated May 2007) http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_5_07.pdf. Map of the United States indicating the legal status of adoptions where one parent in a same-sex couple adopts his or her partner's biological or adoptive child without terminating the legal rights of the first parent.
3. Sonja Larsen, *Adoption of Child by Same Sex Partners*, 27 A.L.R.5th 54 (Westlaw 2008). Annotation collects and discusses reported cases where the petitioners for adoption are same-sex partners, including where one petitioner is a biological parent to the child, as well as cases where neither petitioner is.
4. Spencer B. Ross, *Finstuen v. Crutcher: The Tenth Circuit Delivers a Significant Victory for Same-Sex Parents with Adopted Children*, 85 Denv. U. L. R. 685 (2008). This article addresses the problems created when parents in a same-sex couple are not both recognized as legal parents to the couple's children. The author analyzes a recent opinion of the Tenth Circuit which held that adoptions recognized in one state must be recognized nationwide under the Full Faith and Credit Clause of the Constitution.

Child Custody and Visitation

5. D.L. Hawley, *Custody and Visitation of Children by Gay and Lesbian Parents*, 64 Am. Jur. Proof of Facts 3d 403 (2008). This article discusses legal issues related to a gay or lesbian parent being awarded custody or visitation with a child upon divorce, including factors necessary to determine custody, the best interests of the child, adverse effects, homosexuality and unfitness, and modifications to child custody determinations.
6. Robin Cheryl Miller, *Restrictions on Parent's Child Visitation Rights Based on Parent's Sexual Conduct*, 99 A.L.R. 5th 475 (originally published in 2005). Annotation of federal and state cases discussing whether the non-marital sexual conduct or relationship of a non-custodial parent affects that parent's visitation rights.

7. Robin Cheryl Miller, *Child Custody and Visitation Rights arising from Same-Sex Relationship*, 80 A.L.R. 5th 1 (originally published in 2000). Annotation of federal and state cases discussing the award of child custody or visitation rights to former partners to a now-dissolved same-sex relationship.
8. Elizabeth Trainor, *Custodial Parent's homosexual or lesbian relationship with third person as justifying modification of a custody order*, 65 A.L.R. 5th 591 (originally published in 1999). Annotation of federal and state cases addressing whether one parent's same-sex relationship constitutes grounds for modification of a custody order.

Child and Support

9. Robin Miller, *Child Support Obligations of Former Same-Sex Partners*, 5 A.L.R.6th 303 (originally published in 2005). Annotation of federal and state cases discussing whether a member of a now-dissolved same-sex partnership may be compelled to provide financial support for a child conceived during or raised by the partnership, where the person is not the birth, or an adoptive, parent of the child.
10. Robin Cheryl Miller, *Effect of Same-Sex Relationship on Right to Spousal Support*, 73 A.L.R. 5th 599 (originally published in 1999). Annotation of federal and state cases discussing whether a former partner's same-sex relationship affects that spouse's right to spousal support, either in the original award or subsequent modification.

Civil Orders of Protection

11. Domestic Violence Civil Protection Orders (CPOs) by State, American Bar Association Commission on Domestic Violence (2007). Chart summarizes state laws on domestic violence civil orders of protection, including whether or not they are available for same-sex domestic violence.
12. Protection Order Availability Chart, LGBT Domestic Violence in 2001, National Coalition of Anti-Violence Programs (2002). Chart on the availability of civil orders of protection to same-sex victims of domestic violence by state, including case law and other statutory alternatives where domestic violence civil orders of protection are unavailable.
13. Michelle Auliova, Note, *Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 Fam. Ct. Rev. 162 (2004). This article provides an analysis of domestic violence laws and addresses the inadequate protection afforded to victims of same-sex domestic violence due to the vague or exclusionary language of these statutes. The author groups state laws on civil orders of protection into three categories: those states where orders of protection are (1) clearly unavailable, neutrally available, and affirmatively available to LGBT victims. The author further analyzes relevant case law interpreting gender-neutral statutory language.

Domestic Partnership/Civil Unions/Marriage

14. Civil Unions and Domestic Partnerships Statutes, National Conference on State Legislatures (last updated March 2008)

<http://www.ncsl.org/programs/cyf/civilunions_domesticpartnership_statutes.htm>.
Summary of state domestic partnership and civil union legislation.

15. Map of Defense of Marriage Act (DOMA) Legislation by State, DOMAwatch (visited June 25, 2008) <<http://www.domawatch.org/stateissues/index.html>>. Interactive map that provides a quick reference on DOMA legislation by state.
16. Robin Cheryl Miller and Jason Binimow, *Marriage Between Persons of the Same-Sex- United States and Canadian Cases*, 1 A.L.R. Fed. 2d. 1 (Westlaw 2008). This annotation collects and analyzes the United States and Canadian cases discussing whether the laws of a particular jurisdiction permit two persons of the same sex to enter a legal marriage, and, if not, whether the refusal to permit such a marriage is valid.

Domestic Violence

17. Pamela B. Jablow, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals under Domestic Violence Legislation*, 28 Hofstra L. Rev. 1095 (2000). This article analyzes the exclusion of LGBT victims from domestic violence legislation and asserts that such statutes deny LGBT victims equal protection. Issues such as custody, housing, and property claims are discussed as they relate to LGBT victims of domestic violence.
18. Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 Hastings Women's L.J. 259 (2008). In this article the author addresses the unique characteristics of domestic violence in same-sex relationships. She addresses the way well-intentioned gender-neutral language in domestic violence statutes do not always address same-sex domestic violence, including examples of relevant case law from various jurisdictions.
19. Sharon Stapel, *Falling to Pieces: New York State Civil Legal Remedies available to Lesbian, Gay, Bisexual and Transgender Survivors of Domestic Violence*, 52 N. Y. L. Sch. L. Rev. 247 (2007-2008). This article addresses intimate partner violence in LGBT communities and the civil remedies available in New York state to address it.
20. Elizabeth Trainor, "Cohabitation" for the Purposes of Domestic Violence Statutes, 71 A.L.R. 5th 285 (originally published in 1999). Annotation analyzes cases that interpret the meaning of "cohabitation" in domestic violence statutes, including those cases which involve charges of domestic violence in same-sex relationships.

Foster-Parenting

21. Foster Care Regulations in the United States, National Gay and Lesbian Task Force (last updated September 2007)
<http://thetaskforce.org/downloads/reports/issue_maps/foster_care_regs_09_07_color.pdf>
Map of the United States on foster-care regulations that discriminate against LGBT parents.

Legal Issues- Generally

22. Joan M. Burda, *Gay, Lesbian, and Transgender Clients: A Lawyers Guide*, American Bar Association (December 2007). This book provides case law, statutes and a discussion of

legal issues as they relate to LGBT individuals. Topics addressed include parenting rights, adoption, relationship status, estate planning, immigration and elder law.

23. Joan M. Burda, *Estate Planning for Same-Sex Couples*, American Bar Association (2004). This book provides estate planning attorneys with information on legal issues facing same sex couples. The publication includes a CD-Rom with forms and documents that same-sex couples need to prepare as part of an estate plan.
24. Robin Miller, *Validity of a Claim Predicated on Nonmarital Same-Sex Relationship*, 8 A.L.R.6th 339 (originally published in 2005). Annotation outlining federal and state cases discussing the validity of a state claim predicated on a present or former, acknowledged or alleged, same-sex non-marital relationship.
25. Lambda Legal, Interactive Map of Issues by State (visited June 26, 2008) <<http://www.lambdalegal.org/our-work/states/>>. Interactive map providing information on employment discrimination, parenting, relationship recognition laws and relevant case law by state.

Statistics

26. Kim Fountain and Avy A. Skolnik, National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual and Transgender Domestic Violence in the United States in 2006* (July 2007). Most recent report of the National Coalition of Anti-Violence Programs on the incidences of domestic violence in LGBT communities in 2006.